

# Exhibit 45

*United States of America ex rel. Ven-a-Care of the Florida Keys, Inc. v. Boehringer Ingelheim Corp. et al.*

Civil Action No. 07-10248-PBS

Exhibit to the August 28, 2009 Declaration of James J. Fauci In Opposition To  
Corrected Boehringer Ingelheim Corporation and Boehringer Ingelheim Pharmaceuticals, Inc.  
Local Rule 56.1 Statement of Undisputed Material Facts  
in Support of Their Motion For Summary Judgment

Roxane Laboratories, Inc (James F. McIntyre)

February 26, 2009

Chicago, IL

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

-----X

In Re: PHARMACEUTICAL )

INDUSTRY AVERAGE WHOLESALE ) MDL No. 1456

PRICE LITIGATION ) Civil Action No.

-----X 01-12257-PBS

THIS DOCUMENT RELATES TO: )

United States of America ex )

rel. Ven-a-Care of the )

Florida Keys, Inc., et al. )

v. Boehringer Ingelheim )

Corp., et al., Civil Action )

No. 07-10248-PBS )

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The videotaped 30(b)(6) deposition of  
Roxane Laboratories, Inc., Roxane Laboratories, Inc.  
n/k/a Boehringer Ingelheim Roxane, Inc., Boehringer  
Ingelheim Pharmaceuticals, Inc., and Boehringer  
Ingelheim Corporation by JAMES F. McINTYRE

Chicago, Illinois

Thursday, February 26, 2009

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1 IN THE COURT OF THE SECOND JUDICIAL CIRCUIT

2 IN AND FOR LEON COUNTY, FLORIDA

3 -----X

4 THE STATE OF FLORIDA )

5 ex rel. )

6 VEN-A-CARE OF THE )

7 FLORIDA KEYS, INC., a )

8 Florida Corporation, )

9 by and through its )

10 principal officers )

11 and directors, )

12 ZACHARY T. BENTLEY )

13 and T. MARK JONES, )

14 Plaintiffs, )

15 vs. ) Civil Action No.

16 BOEHRINGER INGELHEIM ) 98-3032A

17 CORPORATION, et al. )

18 Defendants. )

19 -----X

20  
21  
22 (cross-captions continue on following page)

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1           A.     Well, all of our operating units are  
2     separate legal entities, so each one reported  
3     separately.

4           Q.     I'm looking at this -- well, let's maybe  
5     take a step back. When was the first time you saw  
6     this document?

7           A.     I don't recall whether I saw this back at  
8     the time of the project or not, but certainly  
9     during the course of preparing for this deposition  
10    I've seen it.

11          Q.     Does this appear to be a presentation  
12    that Mr. Tetzner made?

13          A.     That's what it appears to be, yes.

14          Q.     And the language you just read, he says -  
15    - or the slide says, "We currently operate in the  
16    U.S. with a variety of legal entities that do not  
17    necessarily reflect the nature of our businesses.  
18    This results in two sets of reporting: One in terms  
19    of legal entities and another in terms of  
20    businesses." Do you see that?

21          A.     Yes.

22          Q.     I'm trying to understand what -- what's

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1 the difference between a -- a reporting that is in  
2 terms of legal entities as opposed to reporting in  
3 terms of businesses?

4 A. Well, Roxane Laboratories is a legal  
5 entity. But the sales is sales and marketing, and  
6 -- and the operations piece is a manufacturing. We  
7 report separately in terms of -- of the -- the  
8 performance results for those two segments of that  
9 particular company, so we really had two businesses  
10 within that one legal entity. And that's what the  
11 organization was trying to -- reorganization was  
12 trying to fix.

13 Q. Why was this regarded as something that  
14 needed to be fixed?

15 A. The -- the manufacturing business, who  
16 was -- the COO was Rob Fromuth, reported directly  
17 to the CEO of the U.S.

18 Q. Mr. Fromuth was a Roxane employee?

19 A. Yes.

20 Q. And who did he report to?

21 A. Marti Carroll, CEO of the U.S. of BIC.

22 Q. CEO -- CEO of BIC?

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1           A.     Yes.   And he was responsible for  
2     operations, our manufacturing.

3           Q.     I believe the question I had asked  
4     earlier was:   Why was this situation regarded as a  
5     problem that needed to be fixed?

6           A.     Well, the sales and marketing side of the  
7     business, who was the vice president or general  
8     manager of the -- the -- the multi-source or the  
9     generic business for Roxane Laboratories, reported  
10    to someone different.

11          Q.     Who was that person?   Who -- who was the  
12    person in charge of the marketing and sales of  
13    Roxane Laboratories?

14          A.     Paul Kersten.

15          Q.     When was Mr. Kersten in charge of that?

16          A.     Oh, at least since 2001.   I don't know if  
17    it goes back any further than that.

18          Q.     And who did he report to?

19          A.     He reports to -- at that time, 2001, Tom  
20    Russillo.

21          Q.     Do you know who Mr. Russillo reported to?

22          A.     Marti Carroll.

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1 Q. When did Marti Carroll become the CEO of  
2 BIC?

3 A. End of 2002 or early 2003, I'm not sure.

4 Q. Do you know who's -- who his predecessor  
5 was?

6 A. Werner Gerstenberg.

7 Q. And so prior to, when Mr. Gerstenberg was  
8 CEO of BIC, would Tom Russillo have reported to him  
9 then?

10 A. Yes, I would suspect so.

11 Q. The second paragraph reads, "This system  
12 often does not convey clearly the performance of  
13 our businesses and leads to complexity in  
14 interpreting how each business is faring. The  
15 accounting reconciliations between the legal  
16 entities and the businesses reduce but do not  
17 remove this complexity." Do you see that?

18 A. Yes.

19 Q. What is an accounting reconciliation?

20 A. To identify -- basically identifying the  
21 costs that are related to the marketing side of the  
22 business versus the manufacturing side of the

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1 business.

2 Q. What do you mean, "identifying"?

3 A. I'm sorry?

4 Q. Can you clarify what you mean by  
5 "identifying the" --

6 A. If we --

7 Q. -- "costs"?

8 A. -- want to separate, we can identify  
9 which costs go with the sales -- sales side of the  
10 business versus which costs go with the  
11 manufacturing side of the business. By having  
12 those two legal entities together, that was a diff  
13 -- that was a challenge.

14 Q. When would an accounting reconciliation  
15 have been performed?

16 A. Every month.

17 Q. Do you know if Roxane and BIPI had their  
18 own internal accounting systems?

19 A. Roxane and BIPI -- beginning --

20 MS. RIVERA: Object to form. Sorry.

21 MR. FAUCI: It's all right.

22 BY THE WITNESS:

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1           A.     Beginning in December of 2000, we were on  
2     the same system, but we were separate legal  
3     entities. So within that system, we had our own  
4     accounting --

5     BY MR. FAUCI:

6           Q.     Separate --

7           A.     -- records.

8           Q.     Separate accounting staffs?

9           A.     In part, yes. Before 2001, yes, there  
10    was completely separate accounting staffs.

11          Q.     And after 2001?

12          A.     After 2001, some of the accounting was  
13    centralized with BIPI as a central service and that  
14    charge -- and they were charged back -- Roxane was  
15    charged back for that service.

16          Q.     What do you mean, "Roxane was charged  
17    back for that service"?

18          A.     The costs -- the costs associated with  
19    performing that accounting service for Roxane was  
20    charged back to the Roxane legal entity.

21          Q.     I'll have some more questions about that  
22    later. I think we'll stick with this document now.

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1 wasn't allocated to BIPI.

2 BY MR. FAUCI:

3 Q. Sitting here today, do you have a sense  
4 of what that bullet point means?

5 A. No, I don't.

6 Q. Skipping down two bullet points, it says,  
7 "introduction of the shared services concept."

8 A. Yes.

9 Q. What is the shared service and con --  
10 services concept?

11 A. That some -- or certain services are  
12 centralized under the BIPI umbrella, but they  
13 perform services and charge those services back to  
14 the subsidiaries, similar to what I just mentioned  
15 about the accounting activities.

16 Q. So this is separate from the Boehringer  
17 Ingelheim Services Center?

18 A. No, I think it's making reference to the  
19 Boehringer Ingelheim Services Center.

20 Q. I'm just trying to be clear. Are you  
21 familiar with an entity known as the Boehringer  
22 Ingelheim Services Center?

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1 A. Yes.

2 Q. Can we call that BISC?

3 A. Yes.

4 Q. Is BISC a separate entity than BIPI?

5 A. At that time, yes.

6 Q. Were there shared services that were  
7 located in BIPI?

8 MS. RIVERA: Object to form.

9 BY THE WITNESS:

10 A. Shared services that were located in  
11 BIPI? Yes.

12 BY MR. FAUCI:

13 Q. And were there shared services that were  
14 housed in the BISC?

15 A. Yes.

16 Q. Which shared services were in BIPI?

17 A. The accounting that I previously  
18 mentioned, the -- I believe at that time tax was  
19 part of BIPI, legal services, I believe, were part  
20 of BIPI. Those are a couple that come to mind.

21 Q. And so --

22 A. HR and IT services.

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1 Q. So those departments would be housed in  
2 Connecticut?

3 A. Yes.

4 Q. And they'd be composed of BIPI employees?

5 MS. RIVERA: I object to form, and I  
6 don't know if we can specify a time frame, 'cause -  
7 - just figure out what time frame we're talking  
8 about.

9 BY MR. FAUCI:

10 Q. When did the shared services concept come  
11 into being?

12 A. Specifically relating to the BISC?

13 Q. No, specifically related to those  
14 services that were located at BIPI.

15 A. Well, it depends on the function.

16 Q. Why don't we go function by function  
17 then.

18 A. Okay.

19 Q. Do you know when a shared services  
20 function for accounting came into being at BIPI?

21 A. 2001.

22 Q. Tax?

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1 A. As far as I know, tax since I've been  
2 with the company in '96, so.

3 Q. Legal?

4 A. Since the beginning of my tenure.

5 Q. HR?

6 A. Again, since the beginning of my tenure.

7 Q. And IT?

8 A. Yes.

9 Q. Beginning of your --

10 A. Beginning --

11 Q. -- tenure?

12 A. -- of tenure.

13 Q. And so I guess my question, the time  
14 frame is from 1996 to the present. Those various  
15 functions, accounting, tax, legal, HR, IT, were  
16 those departments composed of BIPI employees?

17 A. Yes, the best of my knowledge.

18 Q. And those departments had  
19 responsibilities on behalf of Roxane?

20 A. They were centralized services that were  
21 performed by Roxane -- or for Roxane and charged  
22 back to Roxane.

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1 MS. RIVERA: And again I just want to  
2 make sure it's clear for the record that detailed  
3 questions about the shared services outside the  
4 context of how they relate to the legal entity  
5 reorganization in 2005, I object to is beyond the  
6 scope of the subpoena.

7 But go ahead and answer, Jim.

8 BY THE WITNESS:

9 A. Okay. Well, I think it's -- this, to my  
10 knowledge, the -- that it was shared, but it was  
11 charged back to the individual companies, just like  
12 all these other shared services that are listed on  
13 this particular page that we've already discussed.

14 BY MR. FAUCI:

15 Q. Thank you. So turning your attention  
16 back to Exhibit 2 -- actually, just more generally,  
17 you've said earlier that these various services  
18 were charged back to Roxane?

19 A. Yes.

20 Q. What does that mean?

21 A. It means the cost of performing that  
22 service was -- was charged to Roxane and reflected

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1 in their cost.

2 Q. Was that done annually, quarterly?

3 A. That was done monthly.

4 Q. Was Roxane billed?

5 A. I don't --

6 MS. RIVERA: Object to form.

7 BY THE WITNESS:

8 A. I don't know that there was a specific  
9 invoice created, but we were all in the same  
10 system, so it was able to -- it was all done within  
11 the system.

12 BY MR. FAUCI:

13 Q. On an accounting basis?

14 A. Yes.

15 Q. How were the amounts to be charged back  
16 determined?

17 A. It depends on the service. There are  
18 various drivers determined for each service.

19 Q. What's -- I'm sorry, go ahead.

20 A. At the beginning of the year, the service  
21 provider functions, which is basically this list,  
22 where the -- would -- would develop their annual

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1 operating budgets, and then based on whatever the  
2 serve -- whatever the drivers are for a certain  
3 activity, there would be a rate established, and  
4 then each of the legal entities would be charged  
5 back based on that rate and a -- and the amount of  
6 usage of the service they -- they had.

7 Q. Let's try and narrow it down. Let's  
8 stick with legal.

9 A. Okay.

10 Q. Who determined the -- well, if you could  
11 walk me through the process, maybe just focusing on  
12 legal, about how Roxane was charged for those  
13 services.

14 A. The legal department would -- would  
15 develop their annual operating budget, they would  
16 present it to all the receivers of the legal  
17 services, the -- those -- the -- the receivers of  
18 that service, so basically the legal entities,  
19 would -- would have approve -- would be able --  
20 would -- would approve that particular budget or  
21 challenge that budget.

22 And then based on the number of hours

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1 that were estimated to be used within each legal  
2 entity, the -- the legal entities would -- would be  
3 charged back an hourly -- based on an hourly rate.  
4 But they'd -- they would have first -- first right  
5 of -- right of refusal on the budget.

6 Q. When was the budget compiled?

7 A. At the beginning of the budget process.

8 Q. Was it a yearly budget?

9 A. Yes.

10 Q. Would the budgets contain projections for  
11 how much -- what percentage of the legal services  
12 would go to Roxanne, what percent would go to BIPI?

13 A. Yes.

14 Q. What were those projections based on?

15 A. Based on historical average hours. And  
16 then what would happen is on a -- on an ongoing  
17 basis throughout the year, they would be trued up  
18 based on if -- if one legal entity was using more  
19 of a service than another, they would true that up  
20 so that the -- the appropriate legal entity was  
21 charged by the end of the year.

22 Q. Did personnel in the legal department log

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1 how much of their time was spent performing tasks  
2 on behalf of each entity?

3 A. I don't --

4 MS. RIVERA: Object --

5 BY THE WITNESS:

6 A. -- know.

7 MS. RIVERA: -- to form and foundation.

8 BY THE WITNESS:

9 A. I don't know for sure if they did that.

10 BY MR. FAUCI:

11 Q. So how was it trued up? What was the --  
12 what was the mechanism for deciding whether or not  
13 this projection was accurate for a given month or  
14 quarter?

15 MS. RIVERA: Object to form and  
16 foundation and again entire line of questioning  
17 beyond the scope of the subpoena.

18 But if you know, Jim.

19 BY THE WITNESS:

20 A. I -- I don't know specifically.

21 MR. ANDERSON: This is Jarrott Anderson.

22 And I want to note for the record that it's the

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1 A. Apparently, it says so, yes.

2 Q. Mr. Russillo testified that  
3 notwithstanding his responsibilities for Roxane, he  
4 was on the Ben Venue payroll, and he was not paid  
5 by Roxane. I'm on page 23 of his January 8, 2009,  
6 deposition. And I'll just read you what he said.

7 "Answer: I told you earlier my paycheck  
8 came from Ben Venue.

9 "Question: Your paycheck came from Ben  
10 Venue?

11 "Answer: Yes.

12 "Question: Did your paycheck ever come  
13 from any other Boehringer Ingelheim entities from  
14 the period of November 1997 until 2005?

15 "Answer: I don't believe so."

16 My question to you was: Was there any  
17 formal accounting mechanism within Boehringer  
18 Ingelheim for Roxane to reimburse Ben Venue for  
19 work Mr. Russillo did on Roxane's behalf?

20 A. Not to my --

21 MS. RIVERA: Object --

22 BY THE WITNESS:

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1 A. -- knowledge.

2 MS. RIVERA: -- to form and foundation.

3 BY THE WITNESS:

4 A. Not to my knowledge. It was for the  
5 other sales and marketing people though.

6 BY MR. FAUCI:

7 Q. What do -- say that again.

8 A. There was reimbursement for the other  
9 sales and marketing people that were on Ben Venue  
10 payroll but worked for our -- for Roxane. Those  
11 costs were charged back to Roxane.

12 Q. Which sales and marketing people do you  
13 have in mind?

14 A. The Roxane Laboratories sales and  
15 marketing.

16 Q. Can you give me some names?

17 A. Paul Kersten, Judy Waterer, Leslie  
18 Paoletti.

19 Q. So those people were on Ben Venue's  
20 payroll?

21 A. At that time, yes.

22 Q. Which -- at what time?

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1 A. 2005.

2 Q. Do you know when they started going on  
3 Ben Venue's payroll?

4 MS. RIVERA: Object to --

5 BY THE WITNESS:

6 A. Not --

7 MS. RIVERA: -- form and foundation.

8 BY THE WITNESS:

9 A. Not exactly.

10 BY MR. FAUCI:

11 Q. What was the mechanism whereby Roxane  
12 paid for the services?

13 A. There was accounting entries to charge  
14 back for Roxane legal entity.

15 Q. Do you know how their salaries were  
16 allocated?

17 A. They were completely allocated. All the  
18 Roxane Laboratories sales and marketing people were  
19 completely allocated to the Roxane legal entity.

20 Q. So if a employee had responsibilities on  
21 behalf of both companies, would his salary be  
22 allocated to both companies?

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1 A. I don't know that.

2 Q. Would that be reflected in accounting  
3 records, the allocation?

4 A. Yes.

5 Q. Would it show up on a Roxane income  
6 statement?

7 A. You'd have to drill down to the cost  
8 center level. We wouldn't see it specifically on  
9 the income statement.

10 Q. And so you may have gathered I'm not the  
11 most sophisticated accounting person in the world.  
12 You say drill down to where?

13 A. The cost center level.

14 Q. What does that mean?

15 A. It's a department.

16 Q. And so if you drill down far enough  
17 somewhere, there would be a record that employee X  
18 was paid by Ben Venue but did work on behalf of  
19 Roxane, and then how would that be accounted for?

20 A. It would be charged back to Roxane, and  
21 you'd see it in the sales and marketing department  
22 cost center.

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1 A. Yes.

2 Q. And do you remember that we discussed the  
3 Ipratropium Bromide was the generic equivalent of  
4 Atrovent?

5 A. Yes.

6 Q. And that Atrovent was a BIPI product?

7 A. Correct.

8 Q. Are you aware that in 1996 Roxane  
9 launched Ipratropium Bromide several months in  
10 advance of the expiration of patent exclusivity for  
11 Atrovent?

12 A. Yes.

13 Q. Do you know whether Roxane obtained from  
14 BIPI a license to preemptively launch Ipratropium  
15 Bromide?

16 A. I'm aware that they paid a royalty.

17 Q. What do you mean, "they paid a royalty"?

18 A. It paid an 11 percent royalty to BIPI in  
19 order to -- to sell Ipratropium Bromide.

20 Q. How was that determined, 11 percent?

21 A. Earlier -- early agreements between BIPI  
22 and -- and -- and BII at -- that negotiated royalty

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1 percentage, and that had been validated by outside  
2 third-party consultants, that it was arm's length.

3 Q. I'm sorry, what is "BII"?

4 A. Boehringer Ingelheim International.

5 Q. What is that?

6 A. It's the parent, German parent.

7 Q. And so there was royalty agreements  
8 between BII and BIPI?

9 A. Yes.

10 Q. And those were at 11 percent?

11 A. Ten or 11 percent. Ten percent, I think.

12 Q. Who would be paying royalty -- would BIPI  
13 be paying royalties to BII, or vice versa?

14 A. Depends on which product, but BIPI -- and  
15 in the case of Ipratropium Bromide, BIPI was paying  
16 BII.

17 Q. Do you mean in the case of Atrovent?

18 A. Yes. Atrovent, yeah.

19 Q. And so BII held the patent for Atrovent?

20 A. Yes.

21 Q. And BIPI paid BII 11 percent royalty?

22 A. Ten or 11. I'm not --



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1 Q. I'm -- I'm talking about the relationship  
2 between Roxane and BIPI.

3 A. Uh-huh.

4 Q. We've established that Ipratropium  
5 Bromide is the generic equivalent of Atrovent.  
6 Roxane paid BIPI the same 11 or -- ten or 11  
7 percent royalty that BIPI in turn paid to BIII --

8 A. Yes.

9 Q. -- BII?

10 A. Yes.

11 Q. Was there anything done to establish that  
12 ten or 11 percent was an appropriate royalty rate  
13 for a generic manufacturer to pay the holder of a  
14 branded patent?

15 A. Third-party consultants were brought in  
16 to -- to validate that that was an arm's length  
17 rate.

18 Q. Who?

19 A. At that time, KPMG.

20 Q. Is that the same auditing firm that  
21 established that 11 percent was an appropriate  
22 royalty rate as between BIPI and BIII?

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1           A.     I don't know that, that they were  
2 involved in.

3           Q.     And so this ten or 11 percent was paid by  
4 Roxane for the life of Ipratropium Bromide?

5           MS. RIVERA:   Object to form.

6 BY THE WITNESS:

7           A.     Until the product was discontinued, yes.

8 BY MR. FAUCI:

9           Q.     Okay.   What -- my questions earlier --  
10 let's introduce an exhibit.

11           MR. FAUCI:   Which exhibit are we on?

12                   (WHEREUPON, a certain document was  
13 marked Exhibit McIntyre 006, for identification.)

14           MS. DENTON:   What exhibit are we on?

15           MR. FAUCI:   Six.

16           MS. RIVERA:   Six.

17           MS. DENTON:   I thought this was six.

18           MS. RIVERA:   That was five.

19           MR. FAUCI:   That was five.

20           MS. DENTON:   Okay.

21 BY MR. FAUCI:

22           Q.     Have you -- are you familiar with this

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1 THE VIDEOGRAPHER: We are back on the  
2 record at 10:50 a.m. with the start of tape number  
3 two.

4 BY MR. FAUCI:

5 Q. We were just talking about the process by  
6 which Roxane sold Atrovent to BIPI. Do you  
7 remember that?

8 A. Yes.

9 Q. And you said that it sold it at cost  
10 plus, do you recall that?

11 A. Yes.

12 Q. And we were trying to educate me and the  
13 jury on what cost plus meant. And you said that  
14 cost includes the ingredient costs, the labor costs  
15 and the overhead costs, do you recall that?

16 A. Yes.

17 Q. What's the plus?

18 A. The margin.

19 Q. Do you recall what the margin was?

20 A. No. In the 1993 contract, we were unable  
21 to determine exactly what the margin would have  
22 been and how that pricing was determined for that -

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1 - and during that time frame.

2 Q. So what was the result?

3 A. I'm not sure I understand the question.

4 Q. Oh, when you say you were unable to  
5 determine what the margin was, what do you mean?  
6 In preparation for today?

7 A. Yes.

8 Q. But there was a margin in the 1993  
9 contract that --

10 A. I'd have to --

11 Q. -- presumably?

12 A. -- believe that there was, yes.

13 Q. Do you know what the margin was at any  
14 point in time from 1996 to the present?

15 A. Yes.

16 Q. What was it, and when did it become that?

17 A. We're talking specifically about  
18 Ipratropium Bromide UDV's?

19 Q. Atrovent UDV.

20 A. Atrovent -- Atrovent UDV's. Well,  
21 Atrovent UDV's were discontinued in 2003, so --

22 Q. Okay.

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1 A. -- but be -- up until 2003, the margin  
2 was based -- was 2.2 percent, based on full cost.

3 Q. What does that mean, "based on full  
4 cost"?

5 A. Well, it includes the cost of the active  
6 ingredient.

7 Q. In addition to the labor and the  
8 overhead?

9 A. Labor and the overhead, that's --

10 Q. How was --

11 A. -- correct.

12 Q. -- the 2.2 percent figure arrived at?

13 A. 2.2 percent on total cost is -- gives --  
14 gives the same absolute margin or absolute profit  
15 as ten percent on cost minus API.

16 Q. What is "API"?

17 A. Active pharmaceutical ingredient; that's  
18 the Ipratropium Bromide. The way we do things  
19 today is we charge ten percent on only third-party  
20 acquired materials.

21 Q. Materials acquired from outside --

22 A. Outside, nonaffiliate companies. If it

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1 has affiliate material in there, we subtract that  
2 from the total cost, because that affiliate  
3 material already has some markup, so we don't --  
4 it's not fair to mark it up twice.

5 Q. Okay. So focusing on the Atrovent UDV,  
6 that there would be some markup applied to the  
7 ingredient that Roxane would have purchased from  
8 either BIPI or BII?

9 A. Based -- yes, based on the way we do it  
10 now or did it in -- from -- up until 2003.

11 Q. And so based on the way it was done up  
12 until 2003?

13 A. Yes.

14 Q. And because of that, the margin from  
15 Roxane to BIPI was only 2.2 percent, is that  
16 correct?

17 A. At that time, yes. We don't know what it  
18 was back in '93.

19 Q. When did it become 2.2 percent?

20 A. About that time, 2001, 2002.

21 Q. And it stayed that way until 2003?

22 A. Yeah, we discontinued the product.

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1 Q. And I understand that the -- why the 2.2  
2 was used in place of the ten percent, but how was  
3 the 2.2 number arrived at?

4 A. Because it gave the same -- as I  
5 mentioned, it gave the same level of profit as  
6 using ten percent on a cost excluded the API.

7 Q. Was it negotiated?

8 A. Yes, and later -- later validated by  
9 outside consultants.

10 Q. And would this 2.2 percent or ten percent  
11 markup have been true on all the products that  
12 Roxane manufactured for Boehringer Ingelheim  
13 entities?

14 A. Yes.

15 Q. Let me show you a document marked Exhibit  
16 8.

17 (WHEREUPON, a certain document was  
18 marked Exhibit McIntyre 008, for identification.)

19 BY THE WITNESS:

20 A. 1998 Expectation and Budget.

21 BY MR. FAUCI:

22 Q. It's a September 30, 1998, document, that

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1 MR. FAUCI: Objection to form.

2 BY MS. RIVERA:

3 Q. If you would turn to the page that ends -  
4 - if you see the BOEH numbers there --

5 A. Uh-huh.

6 Q. -- that ends in 452, it's a -- it's right  
7 -- it's a commentary right after the income  
8 statement.

9 A. Total company income statement, right?

10 Q. Yes.

11 A. Yes, okay. I have it.

12 Q. Okay. And it says, "2001 actual income  
13 is 175 million," and it says under that, attribute  
14 -- "Attributable to the Elan deal for the purchase  
15 of pain/palliative care products line." Can you  
16 tell me what that means in terms of how much Roxane  
17 was paid for its divestment of the Elan palliative  
18 care line?

19 A. That -- well, this -- this would  
20 represent the amount of income that they were made  
21 -- made on this sale of the -- the line.

22 Q. Okay. So is that the same as saying that



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1 Roxane made \$175 million from the divestiture of  
2 the Elan products?

3 A. Yes.

4 MR. FAUCI: Objection to form.

5 BY MS. RIVERA:

6 Q. I mean the divestiture of the products to  
7 -- to Elan.

8 A. Yes.

9 Q. Okay. And can you tell from your  
10 knowledge and from your review of the documents  
11 whether that income was budgeted for in -- for  
12 Roxane for 2001?

13 A. I could -- yes, it was -- it was not  
14 budgeted for.

15 Q. Okay. So is this consistent with your  
16 testimony that in 2001 Roxane had a unbudgeted  
17 influx of income in the amount of \$175 million?

18 A. Yes.

19 Q. Okay. And that contributed in part to  
20 the reason why the 2002 dividend payment was  
21 higher?

22 A. That would be --

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1

2

FURTHER EXAMINATION

3

BY MR. FAUCI:

4

5

6

7

8

Q. I believe you testified in response to questions from Ms. Rivera that when Roxane was deciding whether or not to pay a dividend to BIC, it considered whether there was an appropriate debt to equity ratio. Do you recall that?

9

A. That's -- yes.

10

11

Q. What was the debt to equity ratio that was considered appropriate to pay a dividend?

12

13

A. That the ratio -- the guideline ratio is at one-and-a-half to one.

14

15

Q. So just so we're clear on this, that it was appropriate to pay a dividend if there was --

16

A. If the ratio was less than that.

17

Q. If the ratio of --

18

A. If the --

19

Q. -- debt to equity --

20

A. Yes.

21

Q. -- was less than one-and-a-half to one?

22

A. Yes.

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1 Q. Where did that ratio come from?

2 A. That guideline's issued by our German  
3 parent.

4 Q. Can you look back at Exhibit 28.

5 MS. RIVERA: Is that one I marked?

6 MR. FAUCI: Yes.

7 MS. RIVERA: Okay.

8 MR. FAUCI: It's the 12/31/2001  
9 commentary to the financial statements --

10 MS. RIVERA: Okay.

11 MR. FAUCI: -- for year-end.

12 MS. RIVERA: Okay.

13 BY MR. FAUCI:

14 Q. And I'll direct your attention to page  
15 four, where there's a reference to a 2001 actual  
16 income of \$175 million. Do you see that?

17 A. Yes.

18 Q. Is it your testimony that that income was  
19 in addition to Roxane's net income that appears on  
20 its income statement?

21 A. No, this would be part of that.

22 Q. So let's look at Exhibit 20 -- 20.

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1           A.     Exhibit 20.   Mine are not -- obviously  
2     not in very good order.

3           MS. RIVERA:   Me neither.

4     BY MR. FAUCI:

5           Q.     This is the document I showed you that  
6     was the year-end financial statement for Roxane on  
7     December 31, 2001.

8           A.     Yes.

9           Q.     Can you turn to the statement of income.

10          A.     Yes.

11          Q.     What's the net income after tax for  
12     Roxane in 2001?

13          A.     139 million.

14          Q.     Where would I look to see where the \$175  
15     million income --

16          A.     This --

17          MS. RIVERA:   Sorry.

18     BY MR. FAUCI:

19          Q.     -- from the --

20          MS. RIVERA:   Let him finish his question.

21     BY MR. FAUCI:

22          Q.     -- sale of Elan is booked?

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1           A.     This comment is written under subcategory  
2     income slash expense two, so if you look further --  
3     further up the P&L, you'll see something called  
4     "All Other," comma, "II."

5           Q.     I see that.

6           A.     You follow it over to the 2001 actual  
7     column, you'll see 174,000 -- \$174,800,000, that's  
8     the -- that's the reference to the 175 in that  
9     comment --

10          Q.     And why is --

11          A.     -- so --

12          Q.     -- that in parentheses?

13          A.     Because for that particular line item,  
14     parentheses means income. If it's --

15                 MS. RIVERA: Don't try to figure out the  
16     accounting.

17     BY THE WITNESS:

18          A.     That 175 is pretax.

19     BY MR. FAUCI:

20          Q.     Okay. So notwithstanding the fact that  
21     Roxane received 175,000 -- \$175 million for the  
22     Elan sale, its income for 2001 was \$139 million?

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1           A.     That's correct.

2           MR. FAUCI:   I have no further questions.

3           MS. RIVERA:   Okay.

4           MR. FAUCI:   Ros?

5           MS. POLLACK:   I just have a few.

6           MS. RIVERA:   Well, we only -- how much --  
7   do we have to change --

8           THE VIDEOGRAPHER:   I've --

9           MS. RIVERA:   -- the tape?

10          THE VIDEOGRAPHER:   I've got less than a  
11   minute.

12          MS. POLLACK:   Okay.   Why don't we change  
13   it; and that way, we won't have a problem.

14          THE VIDEOGRAPHER:   We are off the record  
15   at 3:15 p.m. with the end of tape number three.

16                               (WHEREUPON, a discussion was had off  
17   the record.)

18          THE VIDEOGRAPHER:   We are back on the  
19   record at 3:17 p.m. with the start of tape number  
20   four.

21  
22                               FURTHER EXAMINATION

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